

(4)  
No. 89-1255

Supreme Court, U.S.

FILED

APR 6 1990

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**In the Supreme Court of the United States**

OCTOBER TERM, 1989

NATIONAL SMALL SHIPMENTS TRAFFIC  
CONFERENCE, INC., ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS  
IN OPPOSITION

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### QUESTION PRESENTED

Whether the Interstate Commerce Commission properly found that an "inadvertence clause" in a tariff, which provided that the lowest potential property valuation would apply to transported property unless the shipper declared a higher valuation on the bill of lading, was consistent with the requirements of 49 U.S.C. 11707 and 10730 (1982 & Supp. V 1987).



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## **OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 887 F.2d 443. The opinion of the Interstate Commerce Commission (Pet. B1-B9) is unreported.

## **JURISDICTION**

The judgment of the court of appeals was entered October 10, 1989. A petition for rehearing was denied on November 6, 1989. Pet. App. C1. The peti-

tion for a writ of certiorari was filed on February 5, 1990 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. Under the Interstate Commerce Act (Act), a motor common carrier must file tariffs with the ICC containing the rates and other conditions for the transportation and service it offers. 49 U.S.C. 10761, 10762 (1982 & Supp. V 1987). After a carrier has received property for transportation under a tariff, it issues a bill of lading which, together with the tariff, constitutes the transportation contract. The bill of lading generally provides that the transportation is subject to the provisions of the governing tariffs. It also typically provides that when the tariff rate depends upon the value of the property shipped, the shipper must state specifically the declared or agreed-upon value. Pet. App. B2-B3.

This case involves the construction of two provisions of the Act, 49 U.S.C. 11707 and 10730 (1982 & Supp. V 1987). Section 11707 provides that, absent an agreement to the contrary, common carriers assume liability for the actual loss or injury to property they transport. Section 10730, however, provides that carriers may file tariffs containing "rates for the transportation of property under which the liability of the carrier \* \* \* for such property is limited to a value established by a written declaration of the shipper or by written agreement between the carrier \* \* \* and shipper if that value would be reasonable under the circumstances surrounding the transportation." 49 U.S.C. 10730 (1982 & Supp. V 1987).

2. Petitioners filed a complaint with the ICC seeking the cancellation, in particular tariffs, of tariff

items containing "inadvertence clauses." The tariffs set forth four "released-rate" options, under which the rates for transportation escalate with increases in the agreed-upon value of the property shipped.<sup>1</sup> The tariffs also include an inadvertence clause that provides: "If Consignor fails to declare a released value at time of shipment, shipment will be subject to the lowest released value herein." In effect, the inadvertence clause results in the application of the lowest released value (and, correspondingly, the lowest available rate) when the shipper fails to specify a higher value for its property. Pet. App. B2-B4.

Petitioners contended that inadvertence clauses are per se unlawful under 49 U.S.C. 10730 (1982 & Supp. V 1987). Pet. App. B4-B6. The ICC rejected that argument. The Commission noted that "inadvertence clauses are regularly included in released rate tariff[s] approved by the Commission" in order to permit carriers to classify property "when the shipper has failed to declare a value for its shipment." Since shippers may tender commodities of extremely high value, the absence of a default rate could be "extremely harmful" to large carriers and "catastrophic" to small carriers, because shippers could unilaterally impose full liability on a carrier by choosing not to declare the value of a shipment under a released-rate tariff. Pet. App. B6-B7.

Although in a prior decision the ICC had criticized inadvertence clauses, see *Released Rates on Small Shipments Tariff*, 361 I.C.C. 405, 413 (1979), the

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<sup>1</sup> In transportation parlance, the term "released value" refers to the agreed-upon level of liability that the carrier assumes in shipping property. The "released rate," in turn, is the rate obtained by the shipper in exchange for agreeing to limit the carrier's liability. Pet. App. B2-B3.

ICC declared that its former view did “not represent current Commission policy.” Moreover, the ICC pointed to “[n]umerous cases” that have sustained the lawfulness of inadvertence clauses under 49 U.S.C. 11707, 10730 (1982 & Supp. V 1987). In particular, the ICC cited authority that “the written agreement requirements of section 10730 were satisfied where the tariff contained an inadvertence clause and th[e] shipper failed to declare a released value on the bill of lading.” Pet. App. B7-B8.<sup>2</sup>

3. Applying *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court of appeals denied petitioners’ petition for review. The court first concluded that Congress had not directly addressed the validity of inadvertence clauses in the Interstate Commerce Act. Examining the statutory language and legislative history of the provisions governing carrier liability, the court stated: “We do not share petitioners’ view that there is a pristine clarity to sections 10730 and 11707.” Pet. App. A6.

Turning to the second step of analysis under *Chevron*, the court concluded that the ICC’s interpretation of the pertinent provisions constituted a permissible construction of the statute. The court explained: “The I.C.C. determined, and we agree, that a bill of lading, taken together with the filed tariff containing an inadvertence clause, can constitute a written agreement between the carrier and shipper”; therefore, the requirement of a written agreement, necessary to comply with the limitation-of-liability

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<sup>2</sup> In stressing that the present case involved only a facial challenge, the ICC distinguished cases “where a shipper claims that the [inadvertence] clause has been misused or its existence has been concealed.” Pet. App. B8.

provisions of Section 10730, is satisfied under the tariffs challenged by petitioners. Pet. App. A8.

### ARGUMENT

The court of appeals correctly upheld the ICC's narrow ruling in this case, namely, that inadvertence clauses in a tariff do not facially violate the Interstate Commerce Act. That decision correctly applied the principles of deference that regulate judicial review of an agency's construction of its governing statute. Because the court's decision does not conflict with any decision of this Court or with any decision of another court of appeals, this Court's review is not warranted.

1. Petitioners renew their contention that inadvertence clauses are per se invalid under the Interstate Commerce Act. Pet. 9. In petitioners' view, the only method a carrier may use to limit its liability is to rely on the shipper to "execut[e] the released value clause provided on the bill of lading for that purpose." *Ibid.*

As the court below held, petitioners' interpretation of the Interstate Commerce Act is not evident in the plain language of the statute or its general design; accordingly, deference to the ICC was required. Section 11707, which sets forth the presumption of full value recovery, states that "[a] common carrier may limit its liability for loss or injury of property transported under section 10730 of this title." 49 U.S.C. 11707(c)(4). Section 10730, in turn, provides that the carrier may establish rates that reflect limitations on its liability in accordance with a value set "by written declaration of the shipper or by written agreement between the carrier \* \* \* and shipper[.]" 49 U.S.C. 10730 (1982 & Supp. V 1987). The statute does not define the meaning of the phrase

"written agreement between the carrier \* \* \* and shipper"; in particular, it does not state that only an entry on the bill of lading may satisfy the requirements of the statute for this purpose. Petitioners are therefore mistaken in attributing a clear and precise interpretation to this inherently ambiguous language. Although petitioners' reading is certainly a possible construction of the language, it is far from the only reasonable one. In that context, a court "does not simply impose its own construction on the statute \* \* \*. Rather, \* \* \* the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843; *Sullivan v. Everhart*, 110 S. Ct. 960, 963-964 (1990).

In this case, contrary to petitioners' arguments, the ICC's construction was plainly reasonable. Petitioners assail (Pet. 10-11) the ICC's determination that inadvertence clauses, coupled with the bill of lading that incorporates them by reference, comply with the requirement under 49 U.S.C. 10730 (1982 & Supp. V 1987) that limitations on the value of transported property be established by "written agreement." The ICC's approach, however, comports with the longstanding recognition that the tariff ordinarily defines the terms of transportation, and is incorporated into each bill of lading reflecting the agreement between the parties with respect to the shipment of a particular item. Pet. App. B7-B8. Given that understanding, when the shipper pays a particular rate for transportation, it cannot later avoid the fact that its rate has implications for the valuation of its property. See *American Ry. Express Co. v. Daniel*, 269 U.S. 40, 42 (1925) ("The sender is bound to know the relation established by [the carrier's tariffs] between values and rates.").

The ICC also noted that its view was supported by a "virtually unbroken string of decisions upholding the legality of inadvertence clauses in tariffs." Pet. App. B8. See, e.g., *Mechanical Technology Inc. v. Ryder Truck Lines, Inc.*, 776 F.2d 1085, 1087 (2d Cir. 1985); *W.C. Smith, Inc. v. Yellow Freight Systems, Inc.*, 596 F. Supp. 515, 517 (E.D. Pa. 1983). See also *Co-Operative Shippers, Inc. v. Atchison, T.&S.F. Ry.*, 840 F.2d 447, 451-452 (7th Cir. 1988); *Norton v. Jim Phillips Horse Transportation, Inc.* No. 88-2630 (10th Cir. Mar. 29, 1990) (1990 U.S. App. LEXIS 4624). Against that background, petitioners advance no persuasive reason for rejecting the considered view, articulated by the agency charged with administering the Act, that inadvertence clauses are facially valid.<sup>3</sup>

Indeed, petitioners' arguments fall largely into the domain of policy—a realm that is left to the ICC, not to the courts. Petitioners protest that "the ICC [d]ecision approves a trap for all shippers," Pet. 8, and

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<sup>3</sup> Petitioners claim (Pet. 15) that the ICC's decision is not worthy of deference because the Commission simply adopted prior judicial constructions of the statute, without formulating its own interpretation. However, the ICC thoroughly explained the policy considerations that entered into its decision, Pet. App. B6-B7, as well as its reliance on prior ICC precedent, see *id.* at B6, citing *Machines, Data Processing, Classification Ratings*, 353 I.C.C. 661 (1977). Likewise, petitioners' assertion (Pet. 15) that only a "compelling" reason could justify the ICC's revision of policy is contrary to this Court's decisions. See *American Trucking Ass'ns, Inc. v. Atchison, T.&S.F. Ry.*, 387 U.S. 397, 416 (1967) (regulatory agencies may adapt their rules to the country's needs "in a volatile, changing economy"). Provided the Commission adequately explains its rationale, as it did here, the ICC is free to make permissible changes in the construction of its governing statute. Cf. *Atchison, T.&S.F. Ry. v. Wichita Bd. of Trade*, 412 U.S. 800, 805-809 (1973) (plurality opinion).

that the decision "shift[s] most of the burden for loss or damage to a shipper's freight from the carrier \* \* \* to the shipper," Pet. 7. The ICC, however, was persuaded by the consideration that inadvertence clauses are needed to permit carriers to quantify the risk they are assuming for shipping any particular item, and to assure that they are properly compensated for assuming that risk. The underlying premise of released rates is that shippers can calibrate the degree of protection they wish to purchase for a particular shipment. As the ICC explained, that premise "would be defeated if the shipper, simply by failing to state a value, obtained both a lower rate and full carrier liability." Pet. App. B7 n.3.

Nor does the ICC's decision purport to uphold inadvertence clauses in every case. Rather, the decision leaves open the opportunity for shippers to challenge the reasonableness of inadvertence clauses on a case-by-case basis, looking at all of the transportation circumstances. Cf. 49 U.S.C. 10730(b)(1) (the released value rate must be "reasonable under the circumstances surrounding the transportation"); 49 U.S.C. 11701(b) (shipper can file complaint with the ICC charging an unreasonable practice; 49 U.S.C. 10701(a), 10704(b)(1)); 49 U.S.C. 11707(d) (shipper can file civil action against carrier for damages). There is no reason to believe that the Commission's approach will fail to provide adequate protection when the application of an inadvertence clause would, in a particular case, produce unreasonable results.

2. Petitioners next contend (Pet. 13-19) that the decision below is in conflict with decisions from other courts of appeals considering inadvertence clauses. The cases cited by petitioners, however, either have been superseded by other developments in the law, or are distinguishable on their facts. Accordingly, they

do not present a conflict warranting this Court's review.

To begin with, petitioners rely on two older Second Circuit decisions that no longer reflect the current state of the law in that circuit. Whether or not petitioners can find support for their position in *Gordon H. Mooney, Ltd. v. Farrell Lines, Inc.*, 616 F.2d 619 (2d Cir.), cert. denied, 449 U.S. 875 (1980), and *Caten v. Salt City Movers & Storage Co.*, 149 F.2d 428 (2d Cir. 1945), more recent cases make clear that the Second Circuit now adheres to the view that the bill of lading, read in conjunction with the tariff, can constitute a written agreement for purposes of Section 10730. *Mechanical Technology Inc. v. Ryder Truck Lines, Inc.*, 776 F.2d 1085, 1087 (2d Cir. 1985); *id.* at 1089-1090 (Winter, J., concurring) (noting court's implicit rejection of earlier decisions). The *Mechanical Technology* court explained: "When a sophisticated shipper, using his own bill of lading form, leaves blank the space provided for declaring the released value of the goods, we will presume that he did so deliberately with full knowledge of the consequences under the applicable tariff." *Id.* at 1089; cf. *Ruston Gas Turbines, Inc. v. Pan American World Airways*, 757 F.2d 29 (2d Cir. 1985) (upholding inadvertence clause on common law grounds).<sup>4</sup>

The decisions from the Fourth and Ninth Circuits cited by petitioners addressed different issues. For example, *Chandler v. Aero Mayflower Transit Co.*, 374 F.2d 129, 135 (4th Cir. 1967), did not pass judg-

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<sup>4</sup> Petitioners struggle to distinguish *Mechanical Technology* by noting (Pet. 17 n.12) that the court did not uphold every application of an inadvertence clause. By the same token, the ICC did not purport to uphold every application of such clauses in its decision in this case.

ment on an inadvertence clause at all. In reversing a directed verdict for the carrier, the court found that under principles governing the validity of adhesion contracts, the shipper might be able to establish that the bill of lading in that case did not validly limit the carrier's liability. *Id.* at 135-136. The court went on to state that the district court should consider whether the shipper should also be permitted to present a different theory of liability based on the carriers' failure to "give[] reasonable notice \* \* \* that [the shipper] actually had a choice of 'higher or lower liability by paying a correspondingly greater or lesser charge.'" *Id.* at 137, quoting *New York, N.H.&H.R.R. v. Nothnagle*, 346 U.S. 128, 135 (1953). The court, however, expressed "no opinion" on the application of that theory to the particular facts. 374 F.2d at 137.

Nor did *Mass v. Braswell Motor Freight Lines, Inc.*, 577 F.2d 665 (9th Cir. 1978) (per curiam), squarely consider inadvertence provisions like the ones involved here. In *Mass*, the court reversed a judgment in favor of a shipper and remanded for a new trial to allow the carrier to present the defense that the shipper had fraudulently misdescribed the shipped property. In passing, the court noted that there was no agreement to limit the value of the shipped property since "[t]he bill of lading did not contain a value or freight rate." *Id.* at 667. The court's brief and cryptic statement on that issue, however, did not analyze the argument that the bill of lading coupled with the tariff may constitute an agreement in particular circumstances; indeed, there is no indication that that argument was even advanced.

In *Anton v. Greyhound Van Lines, Inc.*, 591 F.2d 103, 108 (1st Cir. 1978), the court did espouse a theory that is in some tension with the reasoning of

the ICC, but did so only in an alternative holding, addressed to a particular set of facts. Relying principally on the Second Circuit's ruling in *Caten v. Salt City Movers & Storage Co.*, *supra*—a case that no longer correctly states the law in its circuit of origin—the court stated that in order for a carrier to limit its liability by agreement, the shipper must have an “opportunity to choose” the rate level and the corresponding protection it wishes, and a carrier cannot rely simply on the fact that it maintained appropriate tariff schedules with the ICC. 591 F.2d at 108. But the judgment rested equally on the alternative rationale that the carrier had “failed even to *issue* \* \* \* a receipt or bill of lading for plaintiff's goods,” in violation of law. *Ibid.* Consequently, under the court's holding, the carrier had failed to satisfy the requirements for limiting its liability even apart from the application of the inadvertence clause.

Moreover, it is unclear whether the First Circuit would adhere to the views expressed in *Anton* in light of intervening developments in the law. Cf. *United Services Auto. Ass'n v. Paul Arpin Van Lines*, 652 F.2d 198, 201 (1st Cir. 1981) (reserving the question whether *Anton* should be reconsidered). The First Circuit relied on a rationale derived from a Second Circuit case that no longer sets forth the law of that circuit; moreover, the court did not have the benefit of the ICC's current views on the validity of inadvertence clauses.<sup>5</sup> We are unaware of any sub-

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<sup>5</sup> Even on its own terms, *Anton* does not condemn inadvertence clauses *per se*. See 501 F.2d at 108 n.9 (leaving open the issue whether a shipper's “opportunity to choose” might be satisfied in a given case by “an express or implied waiver of choice,” without explaining further the scope or operation of such a rule).

sequent appellate cases applying *Anton* to inadvertence clauses, and, as indicated above, other recent decisions accord with the result reached by the ICC. In those circumstances, we do not believe that any tension between the alternative rationale of *Anton* and the decision below warrants review by this Court.<sup>6</sup>

### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1990

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<sup>6</sup> The remaining cases cited by petitioners are district court decisions; any variance in results in those cases does not warrant this Court's attention.